THE NEW PHILIPPINE GOVERNMENT.

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THE law of July 1st, 1902, "temporarily to provide for the administration of the affairs of civil government in the Philippine Islands," is the first response to the stipulation of the Treaty of Paris made three and a half years ago, that Congress shall determine "the civil rights and political status of the native inhabitants" of the archipelago.

The first section declares that the Constitution of the United States shall not have the same force and effect in the Philippines that it has within the organized territories of the United States.

The same section approves, ratifies and confirms the "action" of the President on three occasions: first, when he created the Philippine Commission on April 7th, 1900, and authorized it to take part in the government of the archipelago; second, when he created the offices of Civil Governor and Vice-Governor, June 21st, 1901; and, third, when he established four executive departments in the islands on September 6th, 1901.

It sets forth that, until otherwise provided, the said islands shall continue to be governed as prescribed in those three actions and in the present law.

Then follows, at the close of the first section, a requirement that in future appointments by the President, of Governors, Vice-Governors, Members of the Commission, and Heads of Executive Departments, confirmation by the Senate shall be necessary.

Whoever has felt interest enough in the subject to observe critically the evolution out of military government, of such civil government as existed in the Philippines before the first of July last, has seen that, in the view entertained by the Administration in Washington, the President, in a case of military occupation,

exercises all of the three differing powers described in the Constitution as legislative, judicial and executive, and that he may rule, as Commander-in-Chief, through civil as well as military officers. Consequently, a second Philippine Commission of five members was created; and on April 7th, 1900, authority was vested in it by the Commander-in-Chief to exercise, in the archipelago, that part of the President's authority which is legislative in character, including the establishment of judicial tribunals, but subject always to his approval, through the Secretary of War, of what may be done. In June of the next year, Judge Taft was authorized by the President to exercise, in certain pacified provinces, that part of his executive power as Commander-in-Chief which had been previously exercised by the General-in-Command at Manila, but subject always to the control of the War Department. To that end, Judge Taft was made Governor of the Island. In the following September, four separate executive departments were created, to which members of the Commission were assigned.

The Spooner amendment to the Army Bill of March 2nd, 1901, only declared that "all military, civil and judicial powers, necessary to govern the Philippine Islands . . shall, until otherwise provided by Congress, be vested in such person and persons, and be exercised in such manner, as the President of the United States shall direct." The army officers and members forming the Philippine Commission were by the President continued in power under the Spooner amendment, and the orders previously issued to them remained in force. The former government of military occupation survived, subject in every particular to the orders of the President, attested by the Secretary of War. The only modification of the former military régime was that a part of the agents of military power were civilians. That which had been referred to as legislative power was not exercised by legislators chosen by the natives to make laws, but by persons appointed by the Commander-in-Chief of the Army, who were to observe some of the usual forms of legislation.

A "Bureau of Insular Affairs of the War Department" is established by the law of July, which shall have charge of all matters pertaining to civil government of the island possessions of the United States, subject to the Secretary of War, and a Colonel of the army is to be chief of the colonial bureau.

Such is the ingenious political contrivance, cleverly adapted to the situation in the Philippines, which has received Congressional sanction. When it shall become necessary to judicially ascertain the limits of the power conferred by Congress on the Philippine Commission, the previous orders issued by the Commander-in-Chief of the Army must be examined and interpreted.

The first section of the new law does not determine civil rights, or political status; but the third section does, when it declares that all of the natives who were Spanish subjects and inhabitants of the archipelago on April 11th, 1899, and were residing there on July 1st, 1902, shall, together with their children born in the islands after the first-named date, be "citizens of the Philippine Islands, and as such entitled to the protection of the United States," unless they shall under the treaty have preserved Spanish allegiance. Their "political status" is to be, not citizens of the United States, but "citizens of the Philippine Islands," entitled to the protection of the government in Washington.

Thus there are now citizens of the United States, citizens of a State, citizens of a Territory, citizens of Porto Rico, and citizens of the Philippines, each with different legal relations.

There need not be complications regarding a citizen of the Philippine Islands, entitled "as such" to Federal protection, when he is in foreign countries. Even if not permitted to expatriate himself, and assume a foreign allegiance, he will probably be permitted to go abroad, and will receive a kind of passport certifying permission to leave the archipelago, and requesting freedom to travel and proper protection "as such"; but the document will not certify American citizenship and nationality. If any existing statute forbids a passport to one not in that category, it will have been modified, *pro tanto,* by the recent enactment. Perhaps an inhabitant of the conquered but unpacified portions of the archipelago could, while under a government by military occupation, receive a passport, and be protected abroad "as such." But what are to be the rights of "citizens of the Philippine Islands," in regard to departure therefrom for the United States, and treatment on arrival? Will they be aliens? What will "equal protection of the laws" mean for them? Can they receive and convey a title to land in the States of the Union in which aliens are prohibited from owning real

estate? There will inevitably arise a large crop of similar questions, which the courts and future laws must answer.

The recent enactment having excluded the Federal Constitution from control in the archipelago, the natives would have been defenceless against the new Philippine government, had the enactment stopped with the first and third sections already described, and in the fifth, ninth and tenth sections their civil rights had not received valuable definition and protection. Congress has therein given to the Philippine natives the statute protection afforded by the Constitution and its amendments, excepting trial by jury, the right to keep and bear arms, a militia force, and just compensation for private property taken for public use. Those civil rights thus given, Congress can, it is true, take away from the Philippines (it cannot take them away from New Mexico), but yet they have by statute been generously conceded.

The fact may as well now be recognized that the theory upon which the Spanish treaty was negotiated—which was that the new islands could be held indefinitely as colonies outside of the Constitution—has prevailed in the recent legislation, which rests on the assertion than an alien people cannot be incorporated into the Union by the treaty-making power; that the government of the United States has the right to acquire and hold territory without immediately incorporating it into the United States; that places subject to the jurisdiction of the United States, but not incorporated into it, are not within the United States; that incorporation of territory acquired by a treaty of cession in which there are conditions against the incorporation until Congress has provided therefor, will not take place until, in the wisdom of Congress, the acquired territory has come into the American family; that the article of the treaty with Spain by which it is declared that the civil rights and political status of the native inhabitants "shall be determined by the Congress" shows a purpose not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary.

Hence the Constitution does not yet control in the new islands.

The recent July enactment not only acquiesces in that as sound, constitutional doctrine, but also adopts the opinion expressed by Justice Gray, that a temporary government which is not subject to all the restrictions of the Constitution, may be set up by Con-

gress over conquered territory, if Congress is not ready to construct a complete government for such territory.

The dissenting opinions of four members of the court, led by the Chief Justice, have not been vindicated by Democratic leaders, in or out of Congress, and have been temporarily submerged.

The artifice of keeping an acquisition, made either by conquest or purchase, outside of the United States by refusing to incorporate, and by dealing with it much as England may deal with a crown colony, has been learned. Perhaps after the treaty of peace had been ratified there was possible no other and better solution of the Philippine problem. The territorial plan, used in 1850 and ever after, might have been perilous in face of insurrection in the islands. Even that plan did not rest on "consent of the governed," popular sovereignty and home rule. Only the people of a State can, under the Constitution, enjoy them. Therefore the natives of the Philippines must either have immediately been made into a State (which would have been preposterous), or left as an independent political community, if they were to regulate their social institutions, local concerns and internal polity in their own way. The citizens of New Mexico have, during half a century, been a subordinate political community subject to Congress under the Constitution. The inhabitants of a Territory, even when under the Constitution, do not govern themselves in their own way without interference by outsiders who are in Washington. Under the old plan which was in use till the last Treaty of Paris, the inhabitants of an organized Territory had immediately and unconditionally all the "civil rights" conferred by the Constitution; but under the new plan, such "civil rights" are either refused, or are doled out by Congress one at a time, and even then "with a string attached."

The ninth and tenth sections of the new law have given protection to the natives by the declaration that the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands, in all actions, cases, causes, and proceedings now pending therein, or hereafter determined thereby, in which (1) the Constitution, or any statute, treaty, title, right or privilege of the United States is involved, or (2) in causes in which the value in controversy exceeds twenty-five thousand dollars, or (3) in which the title, or possession, of

real estate, exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question.

It may be asked what part, under the first section, can the Constitution play before the court. A hopeful reply is to be found in an admission by some of the Justices in the insular cases that, possibly, there may be clauses of the Constitution applicable in the Philippines, even in the absence of Congressional legislation.

The fifth and seventh sections of the enactment on which I am commenting (not in the light of debates in Congress, which I have not read), in the light of the language the law-makers have employed, relate to a future probably very far off, when the existing insurrection in the Philippine Islands shall have ceased; when a condition of general and complete peace shall have been established therein, and the fact shall have been certified to the President by the Philippine Commission; when a census shall have been made and published, and when all is perfect peace outside the non-Christian tribes. Then an election can be held to select delegates to a Philippine Assembly, which is to be one of two legislative bodies of which the Philippine Commission is to be the other, both under the control of a Governor, who, like members of the Commission, is to be appointed by the President. Probably a Philippine Assembly, chosen by the natives, but unable to enact laws, is as much "home rule" as can now be safely promised. That portion of the law does not indicate a purpose on the part of the Congress enacting it, or the present Administration, either to alienate the archipelago, or turn it over within a definite future period, either long or short, to self-government by the natives.

The powers conferred by Congress on the new Philippine government will enable it to acquire by judicial proceedings, commonly known as "condemnation proceedings," any or all of the more than four hundred thousand acres of agricultural lands owned by the religious orders, or by their agents to whom the lands are said to have been colorably assigned. That legislation, when examined in connection with the elaborate report to the Secretary of War, dated November 30th, 1900, made by the Philippine Commission regarding the friars and their property, and when taken with the advice given by Secretary Root to the President upon the same subject on November 27th, 1901, seems

to leave no doubt that the government at Washington had decided that, for the speedy and thorough pacification of the archipelago, it had become, as the Secretary of War said,

"manifestly for the interest of the religious orders that they should convert into money this property, which they can manifestly no longer peacefully enjoy or practically make useful. At the same time, the peace and order of the community, the good-will of the people toward the government of the United States, and the interest of an effected settlement and disposition of all questions arising between the church and state in the islands, make it equally desirable that these lands should be purchased by the state, and that title upon proper and reasonable terms should be offered the tenants, or to the other people of the islands."

It is asserted in the opinion of the Philippine Commission that the four or five hundred Spanish friars, now in Manila, should not be permitted to return to their parishes.

It is more than eighteen months since the Taft Philippine Commission made to the War Department an elaborate report respecting the small remnant of the four religious orders expelled from their parishes a few years ago, and now surviving in Manila, the property, real and personal, owned, held, or claimed by those orders, the assignment, more or less colorable, of the property,—all based on an official examination by Governor Taft of the Archbishop of Manila, several bishops, the provincials of the religious orders, American priests and laymen, army officers, newspaper correspondents and other persons professing to be experts. The result was long ago published by Congress. It is to be relied upon by the country, one would say, as presenting essential facts and sound conclusions, if any official report regarding the morality, or immorality, or political fidelity of the friars, the vast landed interests of the religious orders, and the assignment to duty, by their superiors, of priests of any church, or ministers of any religious denomination, is to be thus regarded under the circumstances. It is to be inferred that Congress accepted those views as correct when it enacted:

"SEC. 63. That the government of the Philippine Islands is hereby authorized, subject to the limitations and conditions prescribed in this Act, to acquire, receive, hold, maintain and convey title to real and personal property, and may acquire real estate *for public uses* by the exercise of the right of eminent domain.

"SEC. 64. That the powers herein before conferred in section sixty-

three may also be exercised in respect of any lands, easements, appurtenances, and hereditaments which, on the thirteenth of August, eighteen hundred and ninety-eight, were owned, or held, by associations, corporations, communities, religious orders or private individuals, in such large tracts, or parcels, and in such manner as, *in the opinion of the Commission*, injuriously to affect the peace and welfare of the people of the Philippine Islands."

The state will be mightier than the church. There will, however, not be, it is to be hoped, the executive visitations, confiscations, and spoliations of three centuries and a half ago in England, but judicial process, full payment of just compensation, and thorough inquiry into the character of the friars hitherto represented as so obnoxious.

The fifth section had ordained that no law shall be enacted in the archipelago depriving "any person of property without due process of law," but it had, for some reason, omitted the clause of the Constitution which forbids the taking of private property for public use without just compensation. That omission is, however, of less consequence in the present case, since the last part of the sixty-fourth section plainly requires payment for the expropriated lands.

Ever since the Supreme Court decided in 1884, in the Juillard case, that Congress had authority, in time of peace, to make a full legal tender out of greenback debt, because that authority is an attribute of sovereignty which had been exercised by England, many things have been attempted by Congress under a similar plea. New things have, first or last, been invented and applied in this new world of ours regarding sovereignty, which is the power to govern. One is that American sovereignty comes up from below, and does not come down from above. Another is that sovereignty can be partitioned among several governments in the same area. Another came to light in the last Treaty of Paris, namely, that sovereignty can be relinquished, abandoned and left floating for a time, as in the case of Cuba.

It was decided by the judgments in the insular cases that the Spanish treaty imparted to Congress an unfettered discretion to distribute in the archipelago those primary civil rights described in the Constitution, which, unlike political privileges, could not be withheld under former treaties of cession. Thus it was that the purchase of the Philippines broke away from the traditions

of our country, and began a new departure, glorious, it may be, but nevertheless novel.

The last phase in sovereignty development and world-wide power is, that, while the government at Washington is not completely sovereign in all domestic affairs, such as governing the Territories, it is sovereign in every foreign affair, and, therefore, could purchase the Philippines on the stipulated condition that they should be, till Congress has determined otherwise, external to the Union, but yet that they can as a domestic affair be lawfully governed outside the Constitution, because they must be governed somehow.

Biographies, letters and diaries are quite certain, soon or late, to reveal the name of the clever lawyer in the McKinley government, or among the American negotiators of the treaty which ceded the Philippines, who invented the novelty in our national jurisprudence, now adopted by Congress, as well as by the Supreme Court, that the archipelago can be kept for an indefinite period so far outside of our Constitution, and external to the United States, that the sovereignty conferred by the people of the several States is unable to reach and protect the natives, but yet that the martial hand of the President can govern them, for the reason that his sovereign authority over them must be as great as that of any Emperor, or King, or Sultan, over his colonies, inasmuch as the United States is sovereign, and therefore its Congress must be sovereign as the British Parliament is sovereign.

The right of "eminent domain" is as well understood and practised in Spain as in the United States. It is as well known in the civil law by the name of expropriation for the cause of public utility, as in the common law by the name of condemnation for a public use. All our Constitutions, national and State, recognize it, and perhaps as the right previously existed by the common law, it was not created by those Constitutions. In the body of the Federal Constitution, there is no mention of "eminent domain," nor of compensation for private property taken for a public use, nor of a religious establishment, nor of the free exercise of religion. Only the amendments of that Constitution cover them, but the amendments restrain only Congress, and not the States. It is Congress that cannot tax, or expend money, for religious work and instruction, and yet the Supreme Court (175, United States Reports 291), has lately upheld an appropriation

by Congress for hospital buildings in which paupers at public charge are to be under the sole control of Roman Catholic sisters. Not till the end of the eighteenth and beginning of the nineteenth centuries did the several States enact religious freedom, and rid themselves of church establishments, of a union of church and state, of religious qualification to exercise civil rights, of taxation for the support of a church.

Congress can, as it is now settled opinion, exercise the right of eminent domain in a State, without consent of the latter. Therefore it obviously can in an American colony. Congress can take private property anywhere within its jurisdiction, and so can a State. Two governments can exercise such sovereign power in the same locality, and that exhibits a partition of sovereignty.

The recent enactment should amply protect the religious orders in the Philippines, because there must, first of all, be "due process of law,"—which will present a judicial question that can go to the Supreme Court.

There cannot be impairment of contracts. There must be a public necessity for taking the lands. The religious orders will be free to argue in the courts that the question of "eminent domain," and "public use," is a judicial question, which Congress cannot decide off-hand, although the government will probably insist that Congress can, as it has attempted to do, confer on the Philippine Commission power to decide arbitrarily and finally whether or not "the peace and welfare of the people of the Philippines" require condemnation of the lands in controversy. Certainly the "use" must be public, but if the sole object in the Philippines is to deprive the religious orders of property or land, and substitute money therefor, is that a "public use"?

There must be a lawful taking of the lands, a just compensation awarded by a lawful tribunal after a judicial trial and ample notice thereof to the owner, and finally an actual payment in legal-tender money of the sum awarded.

If the religious orders are represented by competent, faithful and strenuous lawyers in the Philippines, they should be able, under the recent enactment, to carry every doubtful and important question to the Supreme Court at Washington.

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